prevailed in the probate action, the doctrine of collateral estoppel would apply to the bankruptcy action.

5. Based upon Mr. Sherwin's representation and a review of the *Grogan* case, the defense of the probate matter was tendered to the insurance carrier. The insurance carrier has accepted Evans' tender and on February 5, 1991, our firm substituted in as Evans' counsel in the probate action.

6. One of the first actions taken was to attempt to obtain permission from the insurance carrier to have a Certified Public Accountant review all of the trust financial documents for the purpose of preparing a full and complete accounting. While the carrier has not yet given full approval for such work, the carrier has agreed to have our firm contact a Certified Public Accountant and obtain an engagement letter outlining the scope of the review of the documents and the costs involved therein. It is my belief that such a review will greatly narrow the issues that have to be resolved by the trial court and will significantly serve the interests of justice. An accountant has been contacted and the letter of engagement will be prepared in the next few days.

7. As new counsel in this matter, I believe that the interests of my client will be severely and irreparably harmed if this matter goes to trial on February 11, 1991. I have not had adequate time to review all of the pleadings, trust financial documents, correspondence and other material. Nor have I been able to obtain a transcript of the prior court hearings in order to evaluate the need for additional testimony and evidence.

8. I am further informed that Mr. H.P. Hambrick will be out of the country on February 11 and 12, 1991 and I believe that his testimony will be critical to the position of the respondent.

9. Two sessions of the deposition of H.P. Hambrick have been taken in the bankruptcy case involving the Weir Trusts but that deposition was not completed and I have only been permitted to ask three or four questions, whereas counsel for petitioners herein has been able to ask question for two entire days. Based upon comments made to me by Mr. Sherwin, I believe that he will attempt to use evidence obtained in those two sessions of depositions against respondent and, since my scope of inquiry has been limited, I will not be able to adequately rebut those points raised by the petitioners.

10. I believe that a continuance of ninety (90) days will be required in order to permit a complete review of all the financial records by a Certified Public Accountant and to permit this firm to obtain the manuscripts of the prior hearings and to completely familiarize ourselves with the case.

11. I am requesting a brief continuance of ninety (90) days, so that I can be fully and properly prepared to present this case for trial. I respectfully submit that this brief continuance will not operate to prejudice any of the other litigants. I can also assure this court that there will be no further requests for continuances on behalf of the respondent.

12. At 10:44 a.m. on February 6, 1991, I called Mr. Sherwin's office and asked for him. I was told by Sonia Benjamin that he was in a meeting. I have her the following message. I was calling to give notice of an Ex Parte Application in the *Weir v. Evans* probate case for an order continuing the trial or alternatively, for an order shortening time for hearing on a Motion to Continue the Trial. The hearing on the Application will be held February 7, 1991 at 1:30 p.m. in Department "11" of the Los Angeles Superior Court at 111 N. Hill Street, Los Angeles, California. At 10:50 a.m. on February 6, 1991, I called Robert Orgel's

office. He too was unavailable and I left an identical message with Susan Scott. Lastly, at 10:54 a.m. on February 6, 1991, I called Curtis Danning's office and left an identical message with Beverly Lew.

13. In conclusion, I respectfully request this court not to permit respondent's interests to be threatened, or jeopardized. The interests of fairness and justice should prevail, especially where such a minimal continuance is at issue.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 7th day of February, 1991 at Pasadena, California.

JOHN A. SULLIVAN

JOHN A. SULLIVAN
Declarant

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION

I
A CONTINUANCE OF TRIAL SHOULD BE GRANTED ON AN AFFIRMATIVE SHOWING OF GOOD CAUSE.

In ruling on requests for continuances, trial courts are directed to consider *California Rules of Court*, Rule 375(a), and Section 9 of the *Standards of Judicial Administration*. These two authorities provide that a continuance should be granted on an affirmative showing of good cause.

In detailing the relevant matters, trial courts should consider in ruling on requests for continuances, Section 9 of the *Standards of Judicial Administration*, at paragraph 4, directs trial courts to consider the diligence of counsel; the nature of any previous continuances, extensions, or other delays; the condition of the court's calendar, the proximity of the trial date; and any other fact or circumstance relevant to a fair determination of the motion.

While requests for continuances are subject to the discretion of the trial judge, that discretion must be exercised with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is deemed reversible error. 7 *Witkin, California Procedure*, 3d Edition, "Trial", § 10, page 26-27.

The court in *Broadwell vs. Ryerson*, (1948) 85 Cal.App.2d. 352, 192, P.2d. 797, went even farther:

> "Where the enjoinment of substantial rights of a litigant conflicts with the mere convenience of the court, the rights should not be forfeited in order that the court not be discomoded." Id. at 357.

According to the authorities cited and discussed herein, the facts and circumstances detailed in the Declaration of

John A. Sullivan support a finding of good cause in support of the brief continuance requested, and certainly suggest that this court's discretion should be exercised in favor of a full and fair litigation on the merits rather than any less meaningful alternative.

II
THERE IS AMPLE AUTHORITY TO UPHOLD THIS COURT'S ORDER THAT THE FACTS AND CIRCUMSTANCES AT ISSUE IN THIS CASE JUSTIFY GRANTING THE BRIEF CONTINUANCE REQUESTED.

There is ample substantially analogous judicial precedent in California upholding a finding of good cause for granting the continuance requested.

For example, in *Carli vs. Superior Court* (1984) 152 Cal.App.3d. 1095, 199 Cal.Rptr. 583, a tape containing answers to requests for admission under the old *Code of Civil Procedure* was misplaced following an attorney's departure from the petitioner's law firm. After detailing the facts surrounding the oversight, and the prejudicial effect thereof, namely that requests for admissions were deemed admitted, the *Carli* court issued a peremptory writ of mandate directing the Superior Court to grant the petitioner relief, and commented as follows:

> "Here, the petitioner's law firm lost one of its three attorneys, an event of significance in a firm so small. *Matters must be continued*; files must be reviewed; nervous clients must be placated." Id at 1099. (Emphasis added.)

In *Pearson vs. Continental Airlines* (1970) 11 Cal.App.3d. 613, 89 Cal.Rptr. 853, a case involving a default and request for relief therefrom, the Court of Appeal cited and discussed the facts and circumstances which had re-

sulted in the default. An employee had failed to follow company procedure, failed to communicate essential information regarding a summons and complaint, and default had been entered. In upholding the trial court's order granting relief from that predicament, the Court held that those facts and circumstances constituted good cause for granting the relief requested. The same rule should apply here.

And finally, the court in *Nicholson vs. Rose* (1980) 106 Cal.App.3d. 457, Cal.Rptr. 156 provided some valuable insight:

> "*California Code of Civil Procedure* § 473 allows a court, upon such terms as may be just, to relieve a party from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect. Defendants claim their failure to appear for trial was due to excusable neglect of their counsel. Specifically, they assert that as a result of counsel's defective intra-office communication, the dates for the mandatory settlement conference and for the trial were inadvertently left off counsel's office calendar. But it appears at bench that defendants pursued a course of dilatory tactics and spurious objection throughout the litigation. Further, they themselves set the date for trial. The disposition of a motion to vacate a judgment under *California Code of Civil Procedure* §473 lies within the discretion of the trial court, and each such disposition depends upon the particular facts of the cause. (Citation)." Id. at 460-461.

The conduct of the defendants in *Nicholson* was characterized as spurious and dilatory; here, the conduct of the respondent has been both diligent and in good faith. Due to a lack of funds which led to him filing bankruptcy, Mr. Evans has most recently been unable to afford counsel and has appeared pro per. In addition, he has not been able

to retain a Certified Public Accountant for an accounting. The former condition has now been cured and it is hoped that the latter will be also. In *Rankin v. Curtis* (1986) 1983 Cal.App.3d 939, 228 Cal. Rprtr. 753 which dealt with a trial court's refusal to grant a continuance for a hearing on a Motion for Good Faith Settlement and recently retained counsel, the appellate court held it was an abuse of discretion not to grant a continuance when refusal results in denial of a fair hearing. That is precisely the situation herein.

In conclusion, these authorities all suggest that when a litigant is placed at a disadvantage through an unforeseen set of circumstances, trial courts should grant the litigant relief from the prejudicial consequences thereof. Indeed, that is the legislative intent behind the enactment of *California Code of Civil Procedure* §473.

III
THERE WILL BE NO PREJUDICE TO ANY OF THE LITIGANTS IF THIS BRIEF CONTINUANCE IS GRANTED.

Respondent is requesting only a ninety-day continuance. There will be no adverse consequences to the litigants if that brief continuance is granted.

Moreover, that is not a case which has been litigated at high speed. There has been no demonstrable urgency or other circumstances put forth by any of the litigants in support of having this matter finally resolved at once.

While respondent certainly agrees that the petitioners are entitled to proceed to trial within the confines of this court's system, respondent respectfully submits that they are not entitled to do so at the expense of the other litigants. In light of the circumstances detailed in the Declaration of John A. Sullivan, and the authorities set forth above, respondent requests that its interests now be considered in light of the

absence of any prejudicial effect to petitioners if this brief continuance is granted. Given the absence of any prejudicial effect, there does not appear to be any good cause for not granting this motion.

CONCLUSION

Wherefore, based on all of the above, respondent respectfully requests that this court grant this Application in its entirety, and issue an order continuing the trial for at least ninety (90) days.

DATED: February 7, 1991

HOSP, GRANIERI & CAIRNS
A Law Corporation

By JOHN A. SULLIVAN
JOHN A. SULLIVAN
Attorneys for Respondent
JOHN WENTWORTH EVANS